91-1781

Supreme Court, U.S.
FILED
MAY 7 1992
OFFICE OF THE CLERK

NO. _____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1991

STATE OF ALABAMA,

PETITIONER,

V.

SYLVESTER BROOKS,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT AND COURT
OF CRIMINAL APPEALS OF ALABAMA

APPENDIX TO THE PETITION

OF

JAMES H. EVANS
ATTORNEY GENERAL

AND

JOSEPH G. L. MARSTON, III*
ASSISTANT ATTORNEY GENERAL

ATTORNEYS FOR PETITIONER

ADDRESS OF COUNSEL:

Office of the Attorney General
Criminal Appeals Division
Alabama State House
11 South Union Street
Montgomery, Alabama 36130
(205) 242-7300

*Counsel of Record

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APPENDIX A

ORDER AND FINDINGS OF THE CIRCUIT COURT OF LEE COUNTY, ALABAMA

(R. pp. 267-268)

THE COURT: Okay. The Fourth Amendment to the Constitution provides as follows: The right to the people to secure in their person, houses, papers, and effects against unreasonable searches and seizures shall not be violated and no warrant shall issue but upon probable cause supported by oath or affirmation and particularly describing the place to be searched, the persons and things to be seized.

And then Section 6, Article 1 of the Alabama Constitution provides that the people shall be secure in their person, houses, papers, and possessions from unreasonable seizures and searches and that no warrant shall issue to search any place or to seize any person or thing without

probable cause supported by oath or affirmation.

Okay, the Court finds that the search in this case was not unreasonable. neither were the seizures. That the warrant in this case was issued on probable cause, that it was supported by oath or affirmation, and it particularly described the place to be searched and the persons or things to be seized.

And, therefore, the order and judgment of the Court that the warrant in this case, that is the search warrant, is proper, and I so find.

I also find that the search itself and the matters seized were done pursuant to law and in accordance with the Constitution of the State of Alabama and of the Federal Constitution.

Accordingly, your motions, each of the defendant's motions to suppress is denied. The results of the search, the Court finds, are admissible.

APPENDIX B

[RELEASED: July 26, 1991]

THE STATE OF ALABAMA --- JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1990-91

CR-90-169

Sylvester Brooks

v.

State

Appeal from Lee Circuit Court

(CC-89-017)

PATTERSON, PRESIDING JUDGE

The appellant, Sylvester Brooks, was convicted, after a jury trial, of trafficking in cocaine in violation of §13A-12-231, Code of Alabama 1975. He was sentenced to life imprisonment and was fined $50,000. The appellant raises several issues on appeal; however, we need only address whether the trial court erred by denying his motion to suppress the cocaine seized from his person.

Detective Melvin Harrison of the Opelika Police Department conducted an investigation of possible cocaine sales at John & Bo's Fish Supreme [hereinafter "restaurant"] in Opelika, Alabama. Harrison set up a "controlled buy" in which a confidential informant purchased from Michael Perry[1] a substance (later determined to be cocaine) through one of the restaurant take-out windows. The informant was "wired" with a transmitter, and Harrison observed the transaction take place. Harrison also observed another alleged cocaine sale, although not a controlled buy, by Perry at the take-out window. Harrison also discovered that the restaurant's license and utilities were in the name of Michael Perry. Based on his

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[1] Michael Perry's conviction for trafficking in cocaine was affirmed by an unpublished memorandum. Perry v. State. [Ms. 89-813, April 26, 1991]____So.2d ___ (Ala.Cr.App. 1991).

observations and information, Harrison sought a search warrant.

The affidavit relating to the warrant authorizing the search of the restaurant states, in pertinent part, the following:

> "And ... the facts tending to establish the foregoing grounds for issuance of a search warrant are as follows: a confidential informant in the past forty-eight hours has purchased cocaine from a black male known as Mike Perry at JOHN & BO's FISH SUPREME, 600 South Fourth Street in Opelika, Alabama. The money used in the purchase was copied and the serial numbers recorded. The purchase was also monitored and observed by Det. Harrison. The confidential informant used has been proved to be reliable and in the past has aided in the arrest of several persons. JOHN & BO's FISH SUPREME business license is also under the name of Michael Perry. Det. Harrison checked with the Opelika Light and Power and found that the power at JOHN AND BO's FISH SUPREME is issued to Michael Perry."

The search warrant states, in pertinent part:

"To any Sheriff, Deputy and/or Municipal Police:

"Proof by affidavit having been made this day before me, by Detective Melvin Harrison of the Opelika Police Department.

"You are hereby commanded to make immediate search on the person and premises of Michael Perry, alias, and the business at 600 South Fourth Street, Opelika, Alabama, known as JOHN AND BO's FISH SUPREME, and any other persons therein, and any vehicles on the premise.

"for the following property[:]cocaine hydrochloride or any other controlled substance and United States Currency."

The issue is whether the Opelika police had a constitutionally permissible reason to search the person of Sylvester Brooks. The search warrant provided for the search of Michael Perry, the restaurant, "any other persons therein," and any vehicles. The language "any other persons therein" is not within the dictates of §15-5-3, Code of Alabama 1975, which states: "A search warrant can only be

issued on probable cause, supported by an affidavit naming or describing the person and particularly describing the property and the place to be searched." (Emphasis added.) "As this court has held, general statutes regarding the issuance and execution of search warrants are to be strictly construed." Helms v. State 549 So.2d 598, 600 (Ala.Cr.App. 1989), cert. denied.___U.S.___, 110 S.Ct. 725 (1990). The phrase "any other persons therein" does not identify the person to be searched with reasonable certainty, nor does it particularly describe the appellant. This lack of identity and description "causes the warrant to be fatally defective [as to the search of the appellant] because there was no information to support the probable conclusion that 'anyone in the described place ... [would be] involved the criminal activity in such a way as to have evidence thereof on his person,'" Clark v. State.

527 So.2d 161, 163 (Ala.Cr.App. 1987) (quoting W. LaFave, 2 Search and Seizure §4.5(e) (2d ed. 1987). This rule is especially applicable to cases, such as the present one, in which the officer acknowledged at the suppression hearing that, when obtaining the warrant, he had no knowledge that anyone else was expected to be in the restaurant and that he did not know that the appellant would be present or that the appellant would possess cocaine, any other controlled substances, or United States currency.

Furthermore, this court has recognized the following:

> "[T]he leading case on this issue is Ybarra v. Illinois. 444 U.S. 85, ... (1979). In Ybarra. the United States Supreme Court held that the Fourth and Fourteenth Amendments will not be construed to permit evidence searches of persons who, at the commencement of the search, are on 'compact' premises subject to a search warrant, but are not named or described in the

warrant, even where the police have a 'reasonable belief' that such persons 'are connected with' drug trafficking and 'may be concealing or carrying away the contraband.' 444 U.S. at 94 ... This court, as well as all other courts in this land, is obliged to follow this decision.

"Alabama courts, in following the dictates of Ybarra. have held that a warrant to search designated premises will not authorize the search of every individual who happens to be on the premises. Travis v. State. 381 So.2d 97, 101 (Ala.Cr.App. 1979). cert. denied. 381 So.2d 102 (Ala. 1980). Neither does the fact that law enforcement officials have a warrant to search the house of an accused's girl friend authorize a search of the accused simply because of his presence at the place being searched. Denson v. State. 375 So.2d 1275, 1276 (Ala.Cr.App.), cert. denied. 375 So.2d 1276 (Ala. 1979). Furthermore, a search warrant authorizing the search of 'each and every person present in or near said mobile home' for drugs has been held 'too broad' to pass constitutional muster. Peavy v. State. 336 So.2d 199, 202 (Ala.Cr.App.). cert. denied. 336 So.2d 202 (Ala. 1976). See also Clenney v. State. 281 Ala. 9, 198 So.2d 293 (1966); C.D. Hau#er Co. v.

> Abramson. 215 Ala. 174, 100 So. 152 (1926); C. Gamble, McElroy's Alabama Evidence 334.01(2)(f) (3d ed. 1977)."

Helms. 549 So.2d at 600-01. See also Smith v. State. 292 Ala. 120, 289 So.2d 816 (1974); Bragg v. State. 536 So.2d 965 (Ala.Cr.App. 1988); Thomas v. State. 353 So.2d 54 (Ala.Cr.App.). cert. denied 353 So.2d 59 (Ala. 1977). Accordingly, we conclude that the search of the appellant was not proper based on the warrant.

Because the search of the appellant's person was not justified under the search warrant, the cocaine is due to be suppressed unless the search falls within one of the exceptions to the warrant requirement. "These exceptions are: (1) plain view, (2) consent, (3) incident to lawful arrest, (4) hot pursuit or emergency situations, (5) exigent circumstances coupled with probable cause, and (6) stop and frisk situations." Helms. 549 So.2d at 601. The state, however, asserts no

exception; thus, we do not consider any.

The state does argue, however, that even if the warrant was not properly issued for all persons present, the officers conducted the search of the appellant in good faith reliance on the warrant. However, we reject this argument. We note that the state has failed to cite any authority that has applied the good faith exception to a case of similar facts and circumstances.

> "The good faith exception does not extend to cases where the police have no reasonable grounds for believing that the warrant was properly issued. The Court has identified four situations in which police reliance on a warrant is not objectively reasonable: (1) when the magistrate issued the warrant in reliance on a deliberately or recklessly false affidavit, (2) when the magistrate abandoned her judicial role and failed to act in a neutral and detached manner, (3) when the warrant was based on an affidavit 'so lacking in indicia of probable cause as to render official belief in its existence

> entirely unreasonable,' and (4) when the warrant was so facially deficient that an officer could not reasonably have believed it to be valid."

Special Project, Twentieth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1989-1990. 79 Geo. L.J. 591, 732-35 (1991) (notes omitted). Both the third and fourth points above are applicable in this case.

First, the warrant, as it applied to "any other persons therein," was based on an affidavit "so lacking in indicia of probable cause" as to anyone other than Michael Perry "as to render official belief in its existence unreasonable." The affidavit simply did not provide probable cause to search any person other than Michael Perry.

Second, the warrant was "so facially deficient" as applied to "any other persons therein," "that an officer could not reasonably have believed it to be valid."

Id. A law enforcement officer should reasonably be aware of the well-settled principle of law that mere presence of unnamed and undescribed persons, where an otherwise valid warrant is executed, does not allow a search of those persons when probable cause does not exist. See Smith v. State; Helms v. State; Bragg v. State; Thomas v. State.

Based on the foregoing, the judgment of the circuit court is reversed and remanded.

REVERSED AND REMANDED.

ALL JUDGES CONCUR.

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA
JUDICIAL BUILDING, 445 DEXTER AVENUE
MONTGOMERY 36130

JOHN PATTERSON
Presiding Judge
JOHN C. TYSON, III
WILLIAM M. BOWEN, JR.
SAM TAYLOR
H. WARD McMILLAN
Judges

Clerk's Office
(205) 242-4590

Court of Criminal Appeals No. 90-169
(Lee Circuit Court No. 89-017)

Sylvester Brooks vs. State ofAlabama
Appellant Appellee

Dear Sir or Madam:

You are hereby notifed that on September 20, 1991, the following indicated action was taken in the above-styled cause by the Court of Criminal Appeals of Alabama:

Application for rehearing overruled. Rule 39(k) motion denied. No opinion.

LANE W. MANN
CLERK
COURT OF CRIMINAL
APPEALS

lwm:kl

Hon. Michael D. Cook
360 Fob James Drive
Valley, AL 36854

APPENDIX C

THE STATE OF ALABAMA----JUDICIAL DEPARTMENT
IN THE SUPREME COURT OF ALABAMA
February 7, 1991

1910003

Ex parte State of Alabama
PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

(Re: Sylvester Brooks v. State)

(CCA 90-169 (Lee CC-89-017)

CERTIFICATE OF JUDGMENT
Writ Denied

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari is denied.

KENNEDY, J. - Hornsby, CJ., Almon,, Shores, Adams, Houston, and Ingram, JJ., concur.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said court. Witness my hand this 7th day of Feb 1992

/s/Robert G. Esdale
Clerk, Supreme Court of Alabama

APPENDIX D

RELEVANT ALABAMA STATUTES

Code of Alabama , 1975:

TITLE 13A:

§13A-12-231. TRAFFICKING IN CANNABIS, COCAINE, ETC.; MANDATORY MINIMUM TERMS OF IMPRISONMENT; TRAFFICKING IN ILLEGAL DRUGS; HABITUAL FELONY OFFENDER ACT.

Except as authorized in chapter 2, Title 20: ...

(2) Any person who knowingly sells, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 28 grams or more of cocaine or of any mixture containing cocaine, described in section 20-2-25(1), is guilty of a felony, which felony shall be known as "trafficking in cocaine." If the quantity involved: ...

a. Is 28 grams, but less than 500

grams, then such person shall be sentenced to a mandatory minimum term of imprisonment of three calendar years and to pay a fine of $50,000.00....

TITLE 15:

§15-5-1. "SEARCH WARRANT DEFINED."

A "search warrant" is an order in writing in the name of the state signed by a judge, or by a magistrate authorized by law to issue search warrants, and directed to the sheriff or to any constable of the county, commanding him to search for personal property and bring it before the court issuing the warrant.

§15-5-2. GROUNDS FOR ISSUANCE.

A search warrant may be issued on any one of the following grounds:

(1) Where the property was stolen or embezzled;

(2) Where it was used as the means of committing a felony; or

(3) Where it is in the possession of

any person with the intent to use it as a means of committing a public offense or in the possession of another to whom he may have delivered it for the purpose of concealing it or preventing its discovery.

§15-5-3 PROBABLE CAUSE AND AFFIDAVIT REQUIRED.

A search warrant can only be issued on probable cause, supported by an affidavit naming or describing the person and particularly describing the property and the place to be searched.

§15-5-4. EXAMINATION OF COMPLAINANT AND WITNESSES; CONTENTS OF DEPOSITIONS.

Before issuing a search warrant, a judge, or magistrate authorized by law to issue search warrants, must examine on oath the complainant and any witness he may produce, take their depositions in writing and cause them to be subscribed by the persons making them. Such depositions must

set forth facts tending to establish the grounds of the application or probable cause for believing that they exist.

§15-5-5. ISSUANCE OF WARRANT.

If the judge or the magistrate is satisfied of the existence of the grounds of the application or that there is probable ground to believe their existence he must issue a search warrant signed by him and directed to the sheriff or to any constable of the county, commanding him forthwith to search the person or place named for the property specified and to bring it before the court issuing the warrant.

CERTIFICATE OF SERVICE

I, Joseph G. L. Marston, III, Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for the State of Alabama, Petitioner, hereby certify that on this _____ day of May, 1992, I did serve the requisite number of copies of the foregoing on the Attorney for Sylvester Brooks, Respondent, by mailing the same to said Attorney first class postage prepaid and addressed as follows:

Honorable Michael D. Cook
Attorney at Law
360 Fob James Drive
Valley, Alabama 36854

JOSEPH G.L.MARSTON, III
ASSISTANT ATTORNEY
GENERAL OF ALABAMA

ADDRESS OF COUNSEL:

Office of the Attorney General
Criminal Appeals Division
Alabama State House
11 South Union Street
Montgomery, Alabama 36130
(205) 242-7300

0439H